to the Crown from whose representatives she can well expect, and we hope will readily obtain, a much more liberal allowance for her maintenance with much less difficulty of realization than she could from a distant relation succeeding to the estate.

Upon all these grounds we think the judgment of the Court below is right and ought to be affirmed with costs.

T. A. P. *Appeal dismissed.*

PRIVY COUNCIL.

KRISTOROMONI DASI (PLAINTIFF) *v.* NARENDRO KRISHNA BAHADUR AND OTHERS (DEFENDANTS).

P. C.*
1888
November
6 & 24.

[On appeal from the High Court at Calcutta.]

Hindu Law, Will—Construction of Will—Successive interests bequeathed—Gift over after life interest—Construction of gift to persons, and the heirs male of their bodies.

A will cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mullick case*) (1); secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*) (2), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid.

A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers, had been

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

(1) *Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moore's I. A., 123.

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*, L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.

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born), making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime.

Held, that the gift of the residue, so far as it purported to confer an estate of inheritance on the half-brothers, and the heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect: that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff: and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed.

APPEAL from a decree (16th December 1886) of a Division Bench of the High Court, in its Ordinary Original Civil Jurisdiction.

The question raised on this appeal was whether a bequest in the will of the late Raja Jadubindro Krishna Bahadur, deceased on the 22nd March 1852, had the effect of giving an absolute estate, or of giving an estate for life only, the testator's attempt to limit the succession to male issue of the donee failing, as contrary to Hindu law.

The appellant sued the representatives of the testator, who was her father, to have the will construed, and the rights of all parties declared under it. So much of the will, which was dated 5th March 1851, as is material appears in their Lordships' judgment.

The testator had two half-brothers who both survived him. He left no child but the plaintiff his daughter, who was married, but had no children, when her father died, and to whom afterwards six sons, parties to this suit, were born. The deceased half-brother, Nripendro Krishna, had no son when the testator died, but two sons were born to him afterwards, *viz.*, the second and third defendants, Nil Krishna and Benoy Krishna. Narendro, the surviving half-brother, the first defendant in this suit, had three sons at the testator's death (one of them since deceased leaving a childless widow), and four sons born after the testator's death.

The plaintiff's contention was that, on the death of the half-brother Nripendro Krishna, which occurred on the 19th Novem-

ber 1885, as to all the moiety of the residue of the testator's estate to which Nripendro had been entitled, the trusts and limitations of the will, so far as they were legally capable of being carried out, had been satisfied and ended; and that the plaintiff, as the testator's only child, had then become entitled to that moiety, for the estate of a daughter, by the Hindu law of inheritance. This was claimed as additional to her right under the will to receive for her life the income of the whole residue.

It was contended in the written statements, filed on behalf of the second and third defendants, the sons of Nripendro Krishna deceased, that the two half-brothers took under the will an absolute interest in the testator's estate, subject to the plaintiff's life estate, and subject also to be divested in case Nripendro Krishna and Narendro Krishna should die without leaving an "heir or heirs male of their or either of their body." The second and third defendants also contended that if it should be considered that the half-brothers did not take such an absolute estate, then they, having been in existence at the death of the testator, were the proper objects of the gift in the will, *viz.*, "to the heir or heirs male of their or either of their body."

The six sons of the appellant were in the same interest with her, contending that no such estate as the testator had sought to create could legally exist. Also they contended that assuming gifts of life estates to the half-brothers with remainders to those who might answer the description of heirs male of the body, this was a gift to a class of which some members might not be capable of taking, and it was therefore void. They claimed as heirs of the testator in remainder, immediately after the death of their mother, of all the estate not validly disposed of by the will.

The first of these contentions was allowed by the judgment of the High Court (PETHERAM, C.J., and MACPHERSON, J.) delivered by PETHERAM, C.J.

This judgment stated that the claim of the plaintiff was that the gift of estate to her two uncles was more limited in its nature than the general law of succession would confer, and that the limiting the descent in their male line only was to attempt to create an estate repugnant to Hindu law, the latter being therefore null and void.

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The judgment proceeded thus :—

"The rule of law, as established by the *Tagore case* (1) appears to be that, inasmuch as you cannot give an estate or any interest in it to a person not in existence at the death of the testator, you must give the entire estate with all its ordinary incidents of devolution to the person to whom it is to be given, because anything which is less than that limits his power of disposal over the estate, and therefore gives an interest to some particular line of succession that comes after him to the exclusion of others. This appears to be the rule, and it is said to apply to this case because the words 'to the heir or heirs male of their or either of their body,' which immediately follow the devise to the two half-brothers, are words of limitation, and that such a disposition was an attempt to create in perpetuity an estate in violation of the rule of succession according to Hindu law, somewhat similar to an estate tail, by which this property would devolve from generation to generation in the male line to the exclusion of all females ; and as that was not a gift of the entire estate to the first devisee, the devise beyond the interest of the first devisee must be limited by the ruling in the *Tagore case* to the life interest coming thereafter, and that consequently, one of the brothers who had no sons at the time of the testator's death, having died, there was an intestacy as to one moiety of the estate, and that the plaintiff is entitled to a decree as to that.

"Now, as I said before, the first question for us to consider is, whether that is the meaning of the testator, whether that is the meaning to be collected from the whole of the will. Having regard to the whole of the will, it seems to us that the testator's intention, when he made this will, was that in the event of his two half-brothers (or either of them) living at the time of his death, having male issue, the estate should go to them in equal moieties, but in the event of either of them dying, with reference to their issue, in the same condition that the testator was, that is to say, leaving no son, his own daughter should take the estate in preference to the daughters or widow of his half-brothers ; but all words, so far as we can ascertain, indicate that his intention was, that the estate, when vested in his half-brothers, should be an absolute estate and all that he had to give ; but that in the event of their not having any sons at the time of their death the estate should revert to the son or sons of his daughter, and that they should take the same estate as the testator's half-brothers would have taken in the first instance.

"Let us examine what the words are from which we come to that conclusion. It is necessary that there should be a verbal criticism of the language employed. The first devise is the devise of the income to the daughter, and as to that, as I have said before, there is no dispute ; and then comes a direction to the trustees, that upon the death of the daughter

(1) L. R., I. A., Sup. Vol., 47, 9 B. L. R., 377.

they are to pay over any cash that there may be in existence, and assign and convey the residue of the estate to his two half-brothers. It seems to us that the very use of the word 'pay' indicates that the intention of the testator was that the interest which the brothers were to take with the property so handed over to them was the entire interest in the property at the time. The fact of the trustees handing over the cash, and conveying the estate to the half-brothers of the testator is inconsistent with their handing over any thing else than the whole estate; and therefore the use of the words, 'to the heir or heirs male of their or either of their body,' is inconsistent with that view, if it has a tendency to limit that estate in any way.

"But when one comes to examine these words closely, so far from their being inconsistent with, they rather support that view of the meaning of the other words, and for this reason. As I said before, the property is to be paid and conveyed absolutely to the persons who may be found entitled to it by the first words of this clause, and it appears that the persons who, if they were living, were to be the recipients of the estate, were the two half-brothers of the testator, and then come the words 'to the heir or heirs male of their or either of their body,' but there are after these words no words of limitation or exclusion; therefore, it appears to be pretty clear that the estate which was under any circumstances to be conveyed to the sons of the two half-brothers was to be an absolute estate, because, as I said just now, there is no attempt to limit it in any way. This shows that the intention was that whenever this estate was conveyed from his own trustees to his half-brothers who might be alive, or to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them.

"Then the question arises what effect ought to be given to the words which follow the word 'body,' 'in failure of which in trust to give the same to the son or sons of my said daughter,' and whether if we attempt to give effect to them by giving effect to the view which we have formed of the general meaning of this devise, we shall contravene any rule of law.

"As I said before, the meaning of the first clause in our opinion is, that this estate is, upon the death of the daughter, to be given absolutely to these two half-brothers of the testator, subject to anything that comes after. It appears from the *Tagore case*, as I said just now, that if that is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1), and other cases besides, that although, according to Hindu law, it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty

(1) I. L. R., 4 Calc., 23; L. R., 5 I. A., 138.

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may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

"Under these circumstances, it seems to us that this will may be read as carrying out what we consider to be the true intentions of the testator; which, as I have before said, we think was, that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them, if dead, should take the fee of this property, but that in the event of their having no male descendants at the time of their death, the estate should be divested, and go over to the son or sons of his daughter; and that we think can be carried out on the law as laid down in the case of *Bhoobun Mohini Debi* without prejudice to any rule of Hindu law.

On this appeal,—

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* (Sir *Horace Davey, Q.C.*, with them) appeared for the appellant.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. Pitt-Kennedy*, for the six sons of the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne*, for the respondents, Nil Krishna and Benoy Krishna.

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* for the appellant, submitted that the judgment of the High Court did not give due weight to the manifest intention of the testator to exclude in every event females from the line of succession, as shown, not only by the words "heir or heirs male of their" (*i.e.*, his half-brothers') "or either of their body," but also by the words which followed, *viz.*, "in failure of which in trust to give the same to the son or sons of my daughter." These bequests were made with the intention of impressing on the testator's estate a mode of devolution declared in the judgment in the *Tagore case* (1) to be contrary to Hindu law, and therefore void. It was not the intention of the testator to give to his half-brothers an absolute estate subject to defeasance in the event of they or either of them dying without leaving male issue; but he intended to give them estates which should descend to their heirs male only, excluding the female line. The estate of inheritance, then, which the testator tried to create, was inconsistent with Hindu law, and the bequest could not take effect, at all events,

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.

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for more than the lives of the half-brothers respectively. It would be contrary to the words of the will to make the estates of the half-brothers descend upon their heirs general, and a gift such as this, which was what in English law would be called an estate tail, must be cut down to a gift of a life estate, as it could not by any construction be expanded into a gift of the absolute estate.

They referred to the *Tagore case* (1); and *Tarakeshwar Roy* v. *Shoshi Shikareswar Roy* (2).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. Pitt-Kennedy* for the sons of the appellant, were in the same interests, maintaining the invalidity of the bequest to the heirs male, and asking for costs out of the estate.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne* contended that the High Court had been right in holding that the testator's half-brothers took an absolute estate defeasible only on their dying without male issue living at their deaths respectively. If effect were given to the construction for which the appellant contended, certain important words in the will would not receive their full force and meaning. Those words were directory, *viz.*, "to pay, assign, and convey," and showed that the trustees were to make over the *corpus* of the estate absolutely. Again, it was assumed, in the argument for the appellant, that the bequest, "and to the heirs male of their or either of their body," were words of limitation, and that the bequest was not one of purchase, to use a term of the English law, to the first taker. But to make this assumption was to introduce the rule in *Shelly's case* (3), a course most strongly to be deprecated in construing a Hindu will. The words "heirs male, &c.," were not words of limitation, and they should be struck out altogether; with the result that the gifts were absolute in the first instance. This case was distinguishable from the *Tagore case* (1), in which the first estate was one for life; it being here an estate to the half-brothers with a devise over to a class, *viz.*, those who might

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.
(2) L. R., 10 I. A., 51; I. L. R., 9 Calc., 952.
(3) 1 Co. 96-a.

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answer the description of the heirs of their body. The latter words did not qualify the estate given to the father, which was an absolute one when taken apart from the void limitation which followed it. *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (1) supported the respondents' case. The estate created in the half-brother was no unusual one, and that estate should receive effect by the will being re-moulded in accordance with the testator's views. They referred also to *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (2), and *Baker* v. *Tucker* (3).

Mr. *J. Graham, Q.C.*, replied.

Their Lordships' judgment was delivered by

LORD HOBHOUSE.—The question in this case arises from a rather obscure passage in the will of Raja Jadubindro Krishna, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half-brothers Rajas Nripendro Krishna Bahadur and Narendro Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated 25th March 1851. The testator died in 1852. His daughter, who was his only child, is the plaintiff and appellant in this suit. She has six sons, all born after the testator's death. His brothers both survived him. One of them, Nripendro, has died, leaving only two sons, both born after the testator's death. The other, Narendro, is living. He had three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The defendants and respondents in this suit are Narendro, the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of Nripendro, who are also his executors; and the six sons of the

(1) L. R., 10 I. A., 51; I. L. R., 9 Calc., 942.
(2) I. L. R., 4 Calc., 23; L. R., 5 I. A., 138.
3 H. L. C., 106.

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plaintiff. Every person therefore who could possibly claim an interest under the residuary gift is a party to the suit.

The plaintiff contends that the residuary gift is invalid, except so far as it confers life interests on herself and her uncles, and that on the death of Nripendro the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, *viz.*, in each case, the death of the brother without leaving male heirs of his body then living. The High Court have adopted the latter view of the case, and have dismissed the suit. From their decree this appeal is brought.

The view of the High Court has been supported by the Counsel for the respondents, the brothers' families, who expressly stated that their argument, though endeavouring to amplify and illustrate the High Court's view, must be taken as not departing from it. The High Court considered that the true intention of the testator was "that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them if dead, should take the fee of this property; but that in the event of their having no such descendants at the time of their death, the estate should be divested and go over to the son or sons of his daughter."

This conclusion is rested, first, on the direction to the trustees to "pay, assign, and convey," which, it is said, shows that the whole estate is to be dealt with; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression "heir or heirs male of his or their body;" and, thirdly, on a view of the law which is stated thus:—

"It appears from the *Tagore case* (1) as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (2) and other cases besides, that although according to Hindu law it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377.
(2) 1 L. R., 4 Calc., 23; L. R., 5 I. A., 138.

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entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on a contingency, but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to those rules. It is important to have them accurately stated. And their Lordships find that the statement of the High Court requires some qualifications.

The *Tagore case* decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick case* (1); and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore case*.

The *case of Bhoobun Mohini* conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindu donors who intend to pass the whole inheritance, though they mention only children or issue. Then he said, "No other heir shall be entitled." This was held to mean that, if Kasiswari

(1) *Soorjeemoney Dossee* v. *Denobundhoo Mullick*, 9 Moore's I. A., 123.

died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter.

Upon the construction of this will, their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the period for which the trust continues; it is on her death that the trustees are to pay, assign, and convey; and the question is, to whom? The payment, &c., is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression "pay, assign and convey" is important to show as much as that, but their Lordships do not enter upon any discussion, such as has taken place in England, as to the effect of such words upon the nature of the gift over. They treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words "heirs male" be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator.

The latter of these two alternatives can only be reached by reading the word "and" as if it was "or." Indeed one

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passage of the judgment looks as if this construction was in the minds of the learned Judges. They point out that no words of limitation are attached to the words "heirs, &c." And they add, "This shows that the intention was that whenever the estate was conveyed from his own trustees to his half-brothers who might be alive, *or* to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them." This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general, or it might be to the alienees, not to the male descendants.

The absence of words of limitation after the words "heirs, &c.," does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the appellant's than the respondents' construction, because if "heirs, &c.," are themselves words of limitation, words of limitation attached to them would be inappropriate, otherwise they would be appropriate, and they would tend to show that the "heirs" were objects of direct gift.

But upon putting it to Mr. Rigby whether he claimed to read the word "and" in a disjunctive sense, he at once disclaimed any such contention; and, indeed, it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the respondents.

Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is composed in English; the draftsman seems to have had a smattering of English real property law; he clearly knew there was a difference between a son and an heir male of the body; and apparently he had English dispositions of property in his eye. This seems to be an attempt of a kind not infrequent among Bengal zemindars of late years to introduce English estates tail into Hindu property which the law will not allow. At all events their Lordships must construe the words in their plain and obvious sense; and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling

an English estate in tail male. That cannot take effect. But the testator intended to benefit his brothers personally; and his gift to them and their heirs male would, if valid, have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (1).

Whether the words which introduce the gift over, "in failure of which," import a general failure of the brothers' issue, is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remainder after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails, because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effecting the actual intention of the testator. But if this testator intended not to give an absolute interest, which their Lordships hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordships would not be justified in taking any such liberty with the will.

The plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lord-

(1) L. R., 10 I. A., 51; I. L. R., 9 Calc., 952.

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ships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of the portion discharged there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half-brothers and the heirs male of their bodies, is contrary to law and is void; that in the events which have happened the gift to the sons of the plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half-brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the plaintiff; and that, on the death of Raja Nripendro Krishna Bahadur, the inheritance of his moiety devolved on the plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled in possession to one moiety of the residue. The High Court should place her in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who, by a reasonable construction, could claim them. The suit, or some like suit, was absolutely necessary, and it is not too extensively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree therefore should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal.

They will humbly advise Her Majesty in accordance with this opinion.

Appeal allowed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondents, the Coomars—Nilkrishna and Benoy Krishna: Messrs. *Lawford, Waterhouse & Lawford.*

Solicitors for the respondents, the Mittras (sons of the appellant): Messrs. *Watkins & Lattey.*

C. B.

SHANKAR BAKSH (DEFENDANT) *v.* HARDEO BAKSH AND OTHERS (PLAINTIFFS.)

P. C.*
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Nov. 13, 14 *and* 15.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Partition—Inheritance of talukdari estate in Oudh—Sanad recognizing primogeniture, Effect of as to existing rights of inheritance —Shares held by members of family—Mesne profits on specific and definite shares.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition.

A talukdari estate which, before and after annexation, was subject to the common Hindu law of Oudh, *viz.*, the Mitakshara, was restored, after the general confiscation of 1858, to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards, in 1861, was issued a primogeniture sanad of the above talukdari estate. This sanad could not prevail against the family rights of inheritance; and effect was given to family arrangements, with the same result as regards the two villages.

On the contention that the family, by the effect of the sanads, was to have one head and sole manager in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture: *Held*, that this kind of managership was entirely unknown to the common Hindu law of Oudh; and that, apparently, the Oudh Estates Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was, accordingly, decreed to the members of the family suing for it.

Pirthi Pal Singh v. *Jawahir Singh* (1), as to the right to partition of a talukdari estate, referred to and followed: also, the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family.

* *Present:* LORD FITZGERALD, LORD HOBHOUSE, SIR R. COUCH, and MR. STEPHEN WOULFE FLANAGAN.

(1) L. R., 14 I. A., 37; I. L. R., 14 Calc., 493.

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APPEAL from a decree (12th March 1883) of the Judicial Commissioner, confirming, after a remand (27th April 1882), a decree (17th April 1881) of the District Judge of Sitapur.

The plaintiffs in the suit out of which this appeal arose, Hardeo Baksh, Jagan Nath Singh, and Ganga Baksh, sued for separate possession of their several shares, upon partition of family talukdari estate, together with their shares of profits therein for the Fasli year 1288; claiming also their shares in the other property of the family.

The defendant, Shankar Baksh, denied their right to partition, alleging that they were entitled only to maintenance out of the profits of the talukdari estate, which he claimed as inherited by himself, according to the rule of primogeniture; the latter having been, as he alleged, established by sanad in regard to the taluk.

The principal question, on the whole case, having been whether the talukdari estate descended to the eldest son alone, or was subject to division into shares, in the course of this appeal, the defence on which reliance was mainly placed, on behalf of the appellant Shankar Baksh, was that, notwithstanding that there was participation between the members of the family in the profits, or a beneficial interest in the talukdari estate to that extent, their rights went no further, and that by the effect of the primogeniture sanad, the eldest son was entitled to be sole talukdar, having the management of the estate in his hands, subject to the trusts for the benefit of the other members.

On the annexation in 1856, a talukdari estate, Rampur Kalan, in the Sitapur District, was settled with Anant Singh, Balwant Singh, Hardeo Baksh, the three sons, and with Jagan Nath Singh, the grandson of Dariao Singh, a Kanungo in Oudh. After the Mutiny settlement was made with, and a sanad dated 25th October 1859 was granted to, the same four persons. At the same time separate sanads were given to Dariao Singh as sole talukdar of the separate villages of Saraiyan and Piprawan, which, out of confiscated lands not restored to the previous owner, were granted to him as a reward for his services.

In 1861, Dariao, having received the circular regarding the descent of taluks to one talukdar, replied that the taluk

Rampur Kalan was held by the family in shares, also recognized by the sanad of 1859, and that there was no occasion for a new one. The primogeniture sanad, to which the present question related, was however sent to and retained by him.

On the 2nd September 1867 he died; and, in the following December, mutation in the revenue register was made in the names of the four persons above-named.

At the regular settlement, the shares of the brothers were recorded thus: Anant Singh, 6 annas; Balwant Singh, 5 annas; Hardeo Baksh, 5 annas.

On 3rd November 1871, Balwant, the second son, died; and mutation of name was made in favor of his two sons, Jagan Nath and Ganga Baksh, on the application of Anant Singh, their uncle.

In the official list of talukdars down to 1878, the names of all the sons and grandsons of Dariao were mentioned. Anant Singh, the eldest son, died on 11th October 1879; the name of Shankar Baksh, his son, being entered in his place and the amount of his share being recorded as 6 annas.

In or about 1880, differences arose between Shankar Baksh on the one side and Hardeo Baksh and Jagan Nath on the other, in regard to the question of the rule of inheritance in the talukdari, with the result, after other litigation, that the present suit was instituted.

The District Judge found that the property was ancestral, save the two villages acquired by Dariao, and a small part consisting of purchases by the family: also that the whole was held by the members of the family in specified shares. He referred to the cases of *Hardeo Baksh* v. *Jawahir Singh* (1), adding that, apart from the admissions of Dariao Singh, and his son Anant Singh, "as to the rights of the plaintiffs, their names are entered in the khewats as recorded proprietors, and these papers have been attested both by Dariao and Anant Singh, and upon that point there is and cannot exist any dispute. The plaintiffs, moreover, are in possession up to the present date. They are in the enjoyment of the usufruct according to their respective shares in the estate, and their status as such has never been once disputed, except by the present defendant."

(1) L. R., 4 I. A., 178; I. L. R., 3 Calc., 522.

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His judgment also stated the following :—

"A Commissioner was appointed under the provision of s. 392, Act X of 1877, to make a local investigation as to the exact value of the moveable property appertaining to the estate as well as the profits due to the plaintiffs as recorded proprietors according to the shares so recorded. As, however, the defendant admitted that the profits claimed by the plaintiffs were correct, there was no need for further enquiry upon that point, and the Commissioner's enquiry was therefore limited to the moveable property of the estate. The Commissioner's report upon that question is full and satisfactory, and as no objections have been raised to that report, the finding of the Commissioner will be accepted as correct and binding upon the parties to the suit."

The District Judge's decree was "for the plaintiffs to the extent of a 10-anna share in the entire estate, Rs. 88,182 ; moveable property of the estate Rs. 20,797 as profits, and Rs. 12,065 debts due to the estate. The partition will be made by the Collector under s. 265 of Act X of 1877."

On the defendant's appeal, the suit was remanded, under s. 562, Civil Procedure Code, by the Judicial Commissioner, for the evidence of some witnesses tendered, but not examined. The result was the same decree. The Judicial Commissioner upheld it, in a judgment of which the material part was as follows :—

"I agree with the District Judge that the fact that a primogeniture sanad was granted to Dariao Singh cannot deprive his younger sons of rights which were acknowledged before the grant of that sanad, and were admitted and recorded in the settlement papers after the grant of that sanad.

"All the evidence tends to show that, though the members of the family had agreed as to the manner in which the property should be divided if a separation should take place, they continued to live as a joint family. Had Hardeo Baksh, for instance, had no share in the estate, villages would not have been purchased in his name from the profits of the estate. But the main contention is that, after the declaration of definite and certain shares, the joint family could no longer exist : such a declaration being incompatible with the status of a united family.

"It appears to me that the intention of the parties must be looked to. In the settlement records the share of each brother was recorded, but no separation ever took place. The members of the family continued to

live together, there was no division of profits, there was nothing in fact to show that any separation of right or of property took place or was intended to take place. The family having recorded that the share of the elder branch should be 6 annas and the shares of the younger branches 5 annas each continued to live in union. The arrangement could not come into effect till the family separated. Acting on this arrangement the plaintiffs, respondents, have now sued for their share as representatives of the two younger branches, not for their legal shares as three members of an undivided Hindu family.

"I am of opinion that, though the share which each branch should eventually have was defined, anything like an actual separation of right or of property was indefinitely postponed, and that the family still remained joint and undivided.

"The last objection is that, though there is not a title of evidence of appellant having any moveable property in his possession, the lower Court has decreed Rs. 88,182-5-6 on this account,—and that the law did not authorize the Judge to delegate his function by appointing a Commissioner to value the property.

"It appears that on the 5th July 1881, the District Judge appointed a Commissioner under s. 392 of the Civil Procedure Code, to ascertain the value of the moveable property referred to in the 12th issue, which was "what is the nature and value of the moveable property in the whole estate." The defendant's agent attended the Commissioner; it has not been brought to my notice that the defendant made any objection to the appointment; it was not made a ground of appeal in the first appeal, and I do not see that the appointment was contrary to s. 392 of the Code of Civil Procedure, which empowers the Court to issue a Commission "for the purpose of.....ascertaining the market value of any property." The Commissioner has given full details of the property, and no objection has been taken to the items. I disallow the general objection and uphold the District Judge's finding regarding the amount to which the plaintiffs-respondents are entitled as their share of the moveable property."

On the 8th September 1883, a certificate under s. 600 of the Civil Procedure Code (Act XIV of 1882) was granted by the Judicial Commissioner. On the 13th June 1884, the appellant applied to withdraw his appeal, and to have back the security bond and costs deposited by him; and an order was made to that effect, striking the application for leave to appeal off the file.

On the 16th June 1884, the appellant applied to the Judicial Commissioner for leave to proceed, notwithstanding the above, and the respondents were called upon to show cause why this

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application should not be granted. They urged that the case having been struck off, the case was not then within the competency of the Court to deal with.

On the 28th July 1884, the Judicial Commissioner made an order in the applicant's favor, giving his reasons. They were that a ruling of the Full Bench of the High Court, Calcutta, in *Radha Binode Misser* v. *Kripa Moyee Debia* (1), laid down that "the High Court has the power, and ought to exercise its discretion in each particular case with regard to restoring appeals to the Privy Council, dismissed for default, or removed, for any reason, from the file of the Court." He concluded that under the circumstances, and considering that no harm had been caused to the respondents by the action of the applicant, he ought to accede to his request, on the condition of his paying the respondent's costs of the application, and he directed that the appeal be re-admitted upon the register, and proceed.

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon* for the respondents.

Objection was taken for the respondents to the hearing of the appeal, on the ground that it had not been duly admitted. The Judicial Commissioner had no authority under the Code of Civil Procedure to make his order of the 28th July 1884. The only course for the appellant at that time was to apply for special leave to appeal.

LORD HOBHOUSE said that Counsel for the respondents would be at liberty to make this objection part of their argument, if they should think proper so to do, after the case for the appellant had been heard.

Mr. *R. V. Doyne*, for the appellant, contended that the sanad of the 11th October 1860 was effective to show the introduction of the rule of primogeniture.

The rights of the respondents, regard being had to the terms of the sanad, and to the family declarations and admissions, were to obtain their proportionate shares of the profits or income of the talukdari estate. It was not shown that, by arrangement

(1) 7 W. R., 531; B. L. R., Sup. Vol., 730.

contrary to the terms of the sanad, the members of the family had a right to partition. They might, it was not disputed, take their shares of the profits; but they had no right to break up the taluk. The conduct of the parties pointed to this course, that while the senior member of the family managed the estate, the junior members received their proportion of the profits, as separate interests of their own; and it had been repeatedly decided that a talukdar might be held a trustee; trusts obliging him to hold in some cases on behalf of others interested in the estate. There was no surrender or waiver of the primogeniture sanad, yet it was admitted that the talukdar was bound to give, not only maintenance, but a specific share of the profits to his younger brothers and their sons. The succession to the talukdari estate was governed by the rule of primogeniture, the talukdar having the perpetual right of management, and he alone being invested with that title. He referred to *Hurdeo Baksh* v. *Jawahir Singh* (1), *Hardeo Baksh* v. *Jawahir Singh* (2), *Widow of Shanker Sahai* v. *Kashi Persad* (3), *Pirthi Pal Singh* v. *Jawahir Singh* (4).

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon*, for the respondents, were called upon only as to the question whether mesne profits should be allowed. They were also heard as to the readmission of this appeal on 28th July 1884. They referred to s. 599, Civil Procedure Code, arguing that the Judicial Commissioner had no other power than such as was given in Chapter XLV, Civil Procedure Code, and could not review the order of 13th June 1884. *Radha Binode Misser* v. *Kripa Moyee Debia* (5) was referred to.

LORD HOBHOUSE said that the Judicial Commissioner could bring the appeal on to the file again.

On the question as to the right to mesne profits, it was maintained that the right of the respondents to receive profits had not been questioned. The appellant had made collections,

(1) L. R., 4 I. A., 178; I. L. R., 3 Calc., 522.
(2) L. R., 6 I. A., 161.
(3) L. R., 4 I. A., 198; L. R., Sup. Vol., 220.
(4) L. R., 14 I. A., 37; I. L. R., 14 Calc., 493.
(5) 7 W. R., 531; B. L. R., Sup. Vol., 730.

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and it was on their specific and admitted shares, as regards the profits, that the respondents had been entitled to them. There was an admission as to this spoken of in the judgment of the District Judge.

Mr. *R. V. Doyne*, in reply, said that as long as the family remained joint, the statement of an account could not have been called for. He referred to the finding of the District Judge that the plaintiffs had continued to enjoy the profits of the estate, according to their specific shares, down to the date of the judgment.

Their Lordships' judgment, at the end of the arguments of Counsel, was delivered by

LORD HOBHOUSE.—The principal question raised in this case is whether certain estates which belonged to Dariao Singh, talukdar of Rampur Kalan, go according to the law of primogeniture, or are subject to a family arrangement by which they were divided into shares? The principal estate is known by the collective name of Rampur Kalan. It was an estate which was subject to the common Hindu law of Oudh—the Mitakshara law. It was confiscated with other Oudh estates, and it was restored to the family by sanads. The only material difficulty that exists in the case is owing to the circumstance that two different sanads were granted for the purpose of the restoration: one recognising a division into shares, and the other establishing primogeniture.

Their Lordships have not to deal with the difficult question which has been agitated in so many cases here, whether, to use rather a popular than a legal term, equities shall prevail against the form of the sanad; because, although it was maintained in the Courts below that the primogeniture sanad was to prevail against all inferences to be drawn from the transactions among the family, yet that position has been abandoned now, and Mr. Doyne has very candidly stated that he cannot resist the conclusion that, as regards the beneficial interest in the profits, there must be participation between the members of the family. But what he maintains is that the arrangements led to this inference, that the family was still to have a sole head to it, and that he would take the title of talukdar and have the

management of the property, and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate; and that they could not displace the head of the family from that position.

It is extremely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership, or headship, which could never be displaced or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the common Hindu law of Oudh. Nor is any such thing apparently contemplated by the Oudh Estates Act. Their Lordships do not pronounce an opinion here whether it could legally exist; but assuming that it could, there must be some very clear arrangements between the parties to prove its existence.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. In the last case of *Hardeo Baksh* that of *Pirthi Pal Singh* v. *Jawahir Singh* (1) in the 14th volume of Indian Appeals, very much the same sort of contention was set up. Let us take the statement of the defendant's contention—he was the head of the family—from page 60 of the report. Jawahir Singh prayed a declaration that he was entitled to hold the property "as an integral, impartible, and indivisible estate or taluka subject to the beneficial interest of the defendant in respect of the profits thereof to the extent of his share as declared by the Court." Sir Richard Couch delivered the judgment of the Committee, and observes that Jawahir Singh did hold the estates in "trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee he is bound to allow the partition to be made."

Their Lordships then ask what is the evidence in this case to show that there was an agreement between the members of the family that the head of the family should continue to hold the estate as an entire estate, and hand over the profits? To answer that question it is necessary to touch upon the heads of the case; but owing to the position the argument has assumed,

(1) L. R., 14 I. A., 37; I. L. R., 14 Calc., 493.

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it will not be necessary to go with great particularity into the documents.

It appears that in 1856 a temporary settlement was made, which, by the desire of Dariao Singh, the then head of the family, was in the names of his three sons—Anant, Bulwant, and Hardeo, and a grandson, who was a son of Bulwant. Bulwant and the grandson took one share between them, and the grandson's name may be left out of our consideration. The estate was settled in definite shares, nearly equal, but giving a slight preference of three pies to Anant, the eldest son.

It next appears that a sanad, of which we have no copy, was issued on the 25th of October 1859, in the terms of that temporary settlement. In December 1860 came the circular that was issued to the Oudh talukdars, calling upon them to elect whether they would take their sanads according to the common law of the Mitakshara or according to the law of primogeniture. It is impossible to read that circular without seeing that the officials then were desirous that the talukdars should choose the primogeniture sanads. To that circular Dariao made a reply to this effect: "That at the time of the settlement of 1264 Fusli, in order to avoid future dispute, and according to the custom prevailing in his family, he caused a kabuliat to be executed;" and then he states that it was executed in the manner which has been mentioned, "The sanad, dated 25th October 1859, has been granted by the Chief Commissioner according to the above terms. The petitioner has now no occasion to apply for a fresh sanad, because the aforesaid sanad is enough for them." Therefore he distinctly elects to take a sanad which recognises the co-sharing of all his sons. That election of his is the more pointed because there were two other villages, not then part of Rampur Kalan, though they have since become part, Saraiyan and Piprawan. Those were granted by Government to Dariao Singh in consideration of loyalty; and as to those he prays that "Saraiyan and Piprawan be after the petitioner's death in the name of Anant Singh, the eldest son, in addition to the 5½ annas shares out of taluka Rampur Kalan." Dariao Singh knew perfectly what he was about, and he elects that as to Rampur

Kalan it shall go in shares, and as to the two other villages they shall go according to primogeniture.

It is a very strange thing that in answer to that request of Dariao Singh, the officials should have sent him a primogeniture sanad; but they did so. It was dated, strange to say, before the date of Dariao's answer. Dariao's answer was on the 29th of January 1861; and the sanad is dated on the 11th of October 1860. It was cut-and-dried ready to issue. When precisely it was received by him does not appear, but it was some time between the 13th of December 1860 and the 14th of April 1863. No remark was made upon it. Whether he did not observe that the wrong sanad had been sent to him, or whether he did what is so exceedingly common for Indian gentlemen to do, thought it was best not to be offensive, and to comply with the wish of the Sircar, we do not know. In point of fact no remark was made upon the sanad at that time.

Only one event took place, between Dariao's death and the receipt of the sanad, having any bearing on the question, and that is, that Dariao personally accepted and agreed to pay the Government jumma, and it would seem that his name was entered in the Collector's books as the talukdar.

Nothing further occurred until the 2nd September 1867, when Dariao died; and then came the necessity for a mutation of names; and what took place upon that occasion is, as their Lordships think, the most important feature in the whole case. It is very unfortunate that these documents have been tossed together in a way that makes it difficult to disentangle the proceedings. It will be best to take the case of Saraiyan first.

On the 13th of November 1867, the tahsildar of the district made a statement regarding the death of Dariao, "lambardar of village Saraiyan," and, after showing that his heirs were his three sons, he names as the heir able to become lambardar Anant Singh, that is the eldest son. Then he enters a remark "Dariao Singh, lambardar, has left three young sons, Anant Singh, the eldest son of the deceased is able to become a lambardar;" and he states that, subject to notice, Anant

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Singh's name deserves entry in the register. But Anant Singh was not willing to accept that position, and he presents a petition. In that petition he says that "there has been unanimity without 'any feeling of estrangement' between him and his brothers, and he prays that their names may be entered along with his in the column 'Name of Lambardar.'"

It is difficult to trace the exact proceedings further in respect of Saraiyan; but it is clear that in the result Saraiyan, though clearly granted in primogeniture, was entered in the four names of the three sons and the one grandson.

Turning to Rampur Kalan, we again find that Anant Singh was not desirous of appearing as the sole talukdar. He was called upon to present a fatehnama for mutation of names on his father's death. He sends one as to Saraiyan, and excuses himself as to Rampur Kalan. The three brothers present a petition on the 7th of April 1868, saying, "that the kabuliat of ilaka Rampur Kalan has stood in the name of the petitioners, and a sanad has also been granted in their names, such being the case a fatehnama should not be called for in respect of Rampur Kalan," meaning that no alteration of name was necessary. A fatehnama, however, appears to have been insisted on, and one is sent on the 11th April, but with a protest in the shape of a deposition by Anant. He there states that his father's name was entered as proprietor for Saraiyan only, but since 1264 Fusli "my name and the names of Bulwant Singh and Hardeo Baksh, my brothers, have been entered in the column 'Name of Proprietor,' in respect of the rest of taluka Rampur Kalan. The deceased's name was not there; moreover, the Government has granted a sanad in the name of us three brothers." Then he adds his desire that, "the names of the three brothers be also entered in the column 'Name of Lambardar.' Since 1264 Fusli the names of us three brothers have been entered in respect of all the villages of taluka Rampur Kalan which are situated in Tahsil Biswan; and our names were also entered in respect of certain other villages, but as Dariao Singh, my father, used to remain with the Settlement Officer, and was my superior, therefore at the time of assessment of the present settlement jumma his name was entered in respect of these villages; I now

desire that jointly with my name the names of Bulwant Singh and Hardeo Baksh my brothers be entered as before in equal shares in these villages also;" a most distinct return to the state of things which existed before this primogeniture sanad was sent wrongly to Dariao Singh, and his name was entered in the Collector's book.

The proceedings seem to have occupied a considerable time. No order was made until the 29th of April 1869, when an order was issued in this form by the Deputy Commissioner: "The case is before me for an order as to mutation of names. There is no one to dispute the title of these sons. The hitch, if any, is the fact that Jagan Nath (Bulwant Singh's son) is entered in the Malguzari Register: it must remain there." He was an infant at that time. "Mutation of names is to be in the name of all four: Anant Singh; Bulwant Singh; Hardeo Baksh, and Jagan Nath."

The same sort of proceedings took place in respect of Piprawan, but it is not necessary to follow them out with the same particularity. The result is summed up by the Deputy Commissioner in the year 1841 in a judgment which he delivered on an application for partition, which is quoted in the District Judge's judgment in this case. He says: "In the khewats prepared at regular settlement the shares in the whole ilaka, and also in the grant, were defined as follows: Anant Singh six annas, and the other two sons five annas each. These shares are slightly different from what was stated by Dariao Singh in his letter of 19th January 1861." That was in answer to the circular about the sanads. "By this new arrangement the eldest son, Anant Singh, gave up his exclusive right to two mauzas, and he was recorded as proprietor of a 6-anna share in the whole estate instead of a 5½-anna share in part of it. The khewats were signed by Anant Singh with his own hand."

That was the result. These proceedings show exactly the footing on which the family stood. It is not a question whether Anant Singh made a conveyance to his brothers; though if that had been the question there might be reason to maintain the affirmative. As to Piprawan and Saraiyan, he did most distinctly make a conveyance because those were granted according to the

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law of primogeniture. He took a consideration for it by receiving a larger share in the whole estate. But the value of the proceedings is to show that from 1856 onwards the estate had been treated, notwithstanding the issue of the primogeniture sanad, as an estate which was held in the shares designated in Dariao's letter.

There are many other things in this record which show the same condition of the family, but their Lordships think it not necessary to refer to them, because what has been stated is quite sufficient. But some notice must be taken of those things which, according to the contention of the appellant, would lead to the contrary inference. Mr. Doyne, in his argument, referred to three circumstances. One was that Anant Singh has rested his title not entirely on the earlier sanad, but on both sanads. Another is that in the lists of talukdars that were made out, Dariao Singh's name was entered in respect of Rampur Kalan, in list No. 3, which is one of the primogeniture lists. Another is that in the wajib-ul-arz, which seems to have been framed either under the signatures, or with the assent of, the three brothers, they claim that the succession is to go according to s. 22 of the Oudh Estates Act, which relates to the primogeniture estates.

With respect to the reliance on the two sanads, that is contained in a statement which is called a petition; but it is a statement of Anant Singh's, made on the 9th of July 1868, in the course of the proceedings for mutation of names. All he says is this: he mentions the earlier sanad and then he says that, "a fresh sanad in English and Persian in the name of the petitioner's father (deceased) has been granted as an additional favor, so the taking effect of both the sanads is the cause of further stabilty of the (ilaka) estate." He then goes on to reiterate the case for partition: "From 1263 Fusli up to 1266 Fusli, and up to this day, the settlement of ilaka Rampur Kalan has been in the name of the petitioner, Bulwant Singh, Hardeo Bakhsh, and of Jagan Nath Singh, son of Bulwant Singh, and in the registers of the Collector's Court and of the tahsils, the above-mentioned names are entered all along; such being the case under the rule laid down in the directions of the revenue officers, mutation of names should be

effected without any alteration in the names entered as proprietors." That is the occasion on which he mentions both sanads. But on the very same occasion he also states that the estate is held in co-parcenary according to the family arrangement, and there is not the least appearance upon the face of this document that Anant Singh was considering that there was any conflict between the primogeniture sanad and the co-sharing of the estate between the family, or that he intended for a moment to set up any claim under the primogeniture sanad which was in contravention of the family arrangement.

In March 1869 the sanads were called for, and were sent in for the purpose of preparing the lists. On that occasion, in a petition signed by the three brothers, they prayed that, under Rule No. 3 "our names may be entered in list No. 3;" and the order made by the Deputy Commissioner was: "Enter names in the list." That order was made on the 10th of March 1869. Again we find what one must characterise as a most extraordinary proceeding. Instead of entering the names in the list No. 3, as prayed, the name of Dariao, then dead, was entered in the list No. 3, so that, according to the effect of that list, the estate would go by the rule of primogeniture, and go to Anant alone instead of being divided among the three. It does not appear that any explanation was given to these gentlemen, that any questions were asked of them, that it was pointed out to them that there was an inconsistency between the entry in list No. 3 and the desire to keep the estate in the three names; but there seems to have been, without any further communication, a simple entry of Dariao's name in the list. It is impossible for their Lordships to attach importance to such a proceeding as that.

The third document relied on is the wajib-ul-arz, which was framed on the 1st January 1870; and there, no doubt, occurs a passage that "as the proprietors are talukdars, succession will be regulated by s. 22, Act I of 1869." Well, that is a matter of law, on which they were not very competent to speak; but on the matters of fact, on which they are the most competent of all men in the world to speak, they have no doubt whatever as to what the state of the family was. They state: "From the death of Dariao Singh, the sons, the present taluk-

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dars, have continued in possession of the taluk;" and then lower down they say: "This village"—that is Rampur Kalan, the whole estate,—"is in the possession of talukdars as a joint zemindary; the shares being as follows;" a table shows the shares: Anant Singh six annas; Bulwant and Jagan Nath five annas; Hardeo Baksh five annas. "All the co-sharers live in commensality; accounts of profits and losses are not rendered. Anant Singh, as head of the family, manages the work of collection and assessment." Now that document is an extremely important document as regards the statements of fact. As regard the statement of law, the succession descending according to s. 22, it is of little value. The document is a strong assistance to the case of the plaintiff, and bears directly against the case of the defendant. In fact every group of facts that Mr. Doyne has referred to as leading to the inference that the estate was to be held by the head family as an entire estate, excepting the one fact that there was an improper entry in list No. 3 of the talukdars, strengthens the case for the co-sharership.

Only one other remark has to be made, which is, that during the life of Anant Singh, no attempt was made to disturb this state of things. It was after his death, and when his son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture. Both Courts have decided against that claim. Their Lordships entirely agree with them; and they think that the plaintiffs are entitled to a decree for partition.

The only other question remaining is that which concerns the mesne profits. In a partition suit, relating to an ordinary joint family, mesne profits are not recoverable, as was pointed out in the judgment at page 59 in the 14th Indian Appeals. Speaking of the provisions of the Code as to mesne profits, Sir Richard Couch says: "These provisions are intended for, and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree." The taluk here in question was in a very peculiar position; the family were living together as a joint family, and in commensality, Anant acting as head and not

accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family, but in specific and definite shares. Their Lordships consider that if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition. Before the suit, there seems to have been some inconsistency in the defendant's position. Sometimes he said his brothers were only entitled to maintenance; at other times that they were entitled to specific shares of the profits. But by the plaint and the written statement the matter was distinctly put in issue. The plaintiffs claimed between them a 10 annas share of mesne profits. An issue was stated which is perfectly precise upon the point. "For what period are plaintiffs entitled to mesne profits, and what were the aggregate collections for the period claimed?" A commission of inquiry into that question was ordered, but before the commission, although an inquiry was made as to the value of the estate, there was no inquiry as to the profits, because it was considered that sufficient admissions had been made by the defendant to avoid the necessity of any such inquiry. The exact form in which these admissions were made does not appear, but in the judgment of the District Judge, on the issue that has just been read, the 13th, he finds "that the plaintiffs are entitled to Rs. 20,797 as profits upon the defendant's own admission." That is in the first judgment which he delivered before the remand. There was an appeal from his decision to the Judicial Commissioner, and, on that appeal, one of the grounds of objection was, "that the lower Court should have held that the plaintiffs were not entitled to any profits." The suit was then remanded to the District Judge, not on this ground, but on other grounds, to take oral evidence, and, on the remand, the District Judge came to exactly the same finding with respect to mesne profits. A second appeal was presented to the Judicial Commissioner, and in the grounds of objection upon that second appeal there is no mention whatever of any error as to mesne profits. Therefore, although there are difficulties in understanding the exact grounds upon which the Court came to its conclusion, their Lordships must take it that something passed, either before the Commissioner or before the Court itself, on which

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that finding was rested, and which must, at the time of the appeal from the decree on remand, have been satisfactory to the parties. The alternative would be a most disastrous one; it would be necessary to send back this case for an inquiry, which might result in something more being found for mesne profits, or something less, but which would probably cost a great deal more than the amount in dispute.

Their Lordships think that they ought not to disturb the decree upon this point, and the result is that the appeal fails on every point, and it must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Barrow & Rogers.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Trevelyan.

1889 *January* 10.

GUNAMONI NATH (DEFENDANT No. 7) *v.* BUSSUNT KUMARI DASI (PLAINTIFF) AND OTHERS (DEFENDANTS).*

Vendor and Purchaser—Notice—Notice of possession of rent—Notice of tenancy—Purchaser how far affected with notice of lessor's title.

Notice of possession of the rents of property is notice of the tenancy; but does not of itself affect a purchaser with notice of the lessor's title.

Barnhart v. *Greenshields* (1) referred to.

THE plaintiff, Busunt Kumari Dasi, brought a suit against Nashiram Haldar and six others for the partition of a plot of rent-free *brohmutter* land, containing homestead and garden land and a tank, situate in the village of Barisha in Pergunnah Khaspur, in the District of the 24-Pergunnahs. The property belonged to a family which, at one time, consisted of three brothers—Kristo

* Appeal from Appellate Decree No. 442 of 1888, against the decree of H. Beveridge, Esq., Judge of 24-Pergunnahs, dated the 8th of November 1887, modifying the decree of Baboo Hurikrishno Chatterjee, Munsiff of Alipore, dated the 14th of February 1886.

(1) 9 Moore's P. C., 18.